Supreme Court, U.S.
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No. 01-1569

IN THE

Supreme Court of the United States

INTERNATIONAL LONGSHOREMAN'S ASSOCIATION, LOCAL 1922,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD & SEABOARD MARINE LIMITED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF

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ARGUMENT

I. The National Labor Relations Board Does Not Dispute The Conflict Among Circuits Or The Existence Of An Unresolved Question Of Federal Law.

ILA has identified in its Petition the threshold basis for granting the writ of certiorari and for this Court invoking its discretionary jurisdiction. As explained in the Petition, this Court faces an unresolved question of federal law and a conflict among various Circuit Courts relating to a union's right to obtain judicial review of an otherwise unreviewable decision issued by the National Labor Relations Board (the "Board"). As set forth in *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949), if the Board violates a union's constitutional or due process rights, this vests a district court with jurisdiction to render relief. Various circuits have either adopted or rejected *Fay*, but nearly every court addressing the issue observes that this Court has never resolved the conflict or answered this critical question (*See* Petition at 10-12 n.2). The Board does not contest this issue.

II. A Labor Union Does Not Have A Meaningful Right Of Access To Judicial Review.

Rather than challenge the propriety of this Court's jurisdiction, the Board focuses upon the merits of ILA's claim and attempts to justify the district court's dismissal of ILA's declaratory action. The Board contends that a labor union possesses the same right of access to judicial review as does an employer. The Board's argument is misplaced, however, because it overestimates a union's ability to obtain review of a Board representation decision.

As a threshold matter, it is axiomatic that although an employer has an indirect right of appeal, neither an employer nor a labor union are entitled to appellate or judicial review of a representation decision rendered by the Board under 28 U.S.C. § 159. Historically, however, employers obtain judicial

review of a representation proceeding by forcing a victorious labor union to initiate an unfair labor practice charge. If a group of employees are designated by the Board as a unit and that unit votes for representation by a specific union, the employer merely refuses to acknowledge the union as the authorized bargaining unit. The union has no alternative but to initiate the unfair labor practice charge or risk losing members. Once the Board inevitably determines that the employer committed an unfair labor practice by refusing to bargain with the recognized union, the unfair labor practice charge and the underlying representation decision are reviewable to an appellate court. 29 U.S.C. § 160. This means that anytime an employer is dissatisfied with a Board representation ruling, it obtains appellate review by refusing to bargain with the union. The crux of ILA's predicament, however, as with any union or employee, is that the union, unlike an employer, cannot initiate the unfair labor practice charge that triggers the review mechanism. This means that even if the Board violates a union and employees' due process and First Amendment rights by disregarding its own rules and thereby subjugating the reciprocal right of association and union representation, the aggrieved parties have no avenue for relief. As the Second Circuit observed in *Goethe House, German Cultural Center v. NLRB*, 869 F.2d 75, 80 (2d Cir. 1989):

> As an employer, Goethe House has the option of seeking indirect review of the Board's order by refusing to bargain with the union, if it is certified, and then seeking review of its position in a court of appeals. In [*Leedom*] *v. Kyne*, by contrast, the plaintiff in the district court was a labor organization. As a labor organization, it did not have the option, available to an employer, to seek indirect judicial review of the Board's action.

A losing union, unlike an employer, does not have the ability to "refuse to bargain" with the employer so as to initiate the unfair labor practice charge.

The Board argues that a losing union can initiate the unfair labor practice charge through recognitional picketing which is a violation of 29 U.S.C. § 158 (Response at 6). The Board's suggestion that the union violate federal law by inciting unlawful recognitional picketing is completely contrary to Congress's goal of facilitating smoother employer-employee relations and avoiding negative impact upon interstate commerce. Also, recognitional picketing may have no effect at all. The employer may simply ignore the picketing employees, thereby perpetuating the union's inability to obtain any relief. Alternatively, the employer may pursue injunctive relief and stop the recognitional picketing altogether. *Kobell v. United Food and Commercial Workers Int'l Union*, Local 23, AFL-CIO-CLC, 788 F.2d 189, 194 (3d Cir. 1986) (noting that an employer has the right to obtain injunctive relief against a union engaging in improper picketing). Moreover, those employees who are willing to engage in recognitional picketing may be terminated for cause, thereby losing both their representation rights and their income. In *NLRB v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 109 (3d Cir. 1979), the Third Circuit specifically denounced the Board's argument. As the court explained:

> Unlike the employer, who has it within his own power to preserve the status quo by refusing to bargain, and to obtain judicial review if the Board proceeds against it under § 10 [an unfair labor practice proceeding], the losing union is left without a collective bargaining relationship, and with no certainty that its resort to [recognitional] picketing will produce an unfair labor practice charge. If the picketed employer finds the picketing ineffective, he may refrain from filing a charge. The general counsel may decline to act even if a charge is filed. Moreover, to insist that a losing union begin recognitional picketing in violation of § 8(b)(7)(b)

> would seem to contravene Congress' purpose in enacting the statute limiting such picketing and avoiding its disruptive impact. Worst of all, an employee adherent of the losing union, by picketing in violation of § 8(b)(7)(b) and thus committing an unfair labor practice, incurs a risk of discharge for cause.

The Board's contention that a union or employees should engage in an illegal act as a pretext to obtaining judicial review of a Board violation proves ILA's argument and highlights the magnitude of the issue before the Court. Since there is no statutory right to appellate review when the Board violates its own rules and due process rights, if a union or employees it seeks to represent cannot sue in a district court for the violation, they have no remedy.

III. The Board Violated Its Own Rules And Regulations And ILA's Constitutional Rights By Disregarding And Reversing A Final Decision Rendered By Its Regional Director.

The Board argues that it did not violate its own rules and regulations. As clearly set forth in ILA's petition, however, the Board disregarded 29 C.F.R. § 102.67, which limits the Board's right to accept review of a Decision and Direction of Election issued by a regional director. Board rules specify that a regional director's representation decision will be deemed final unless reviewed for one of four, specific bases. As outlined in the Petition, the Board disregarded the self-imposed limitation, violated its own rules, deprived employees of their choice of representative, and violated ILA's due process and First Amendment rights. This Court should conclude that the *Fay* doctrine vests a district court with subject matter jurisdiction to render declaratory relief to an aggrieved union under such circumstances.

CONCLUSION

For the reasons set forth in the Petition and herein, this Court should grant a Writ of Certiorari and address the merits of this controversy.

Respectfully submitted,

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